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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1946

No. 183

□

RALPH HENRY CAHOON, JR., *Petitioner*

v.

UNITED STATES OF AMERICA *Respondent*

□

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Petitioner's
PETITION FOR REHEARING

HAYDEN C. COVINGTON
Counsel for Petitioner

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MAY IT PLEASE THE COURT:

Within time fixed by rules of court and the order enlarging the time, petitioner files and presents this his petition for rehearing. The court is requested to grant the same and order the petition for writ of certiorari granted.

Grounds

ONE

This Court should have exercised its discretion and granted the writ for each and every one of the reasons stated in the petition for the writ.

TWO

Since denial of the writ of certiorari, the United States Circuit Court of Appeals for the Second Circuit has decided a case exactly like the case at bar. The decision of that court is in direct conflict with that of the court below in this case.

Discussion and Reasons Supporting Petition

The court is respectfully referred to the petition for writ of certiorari. See pages 2-4, 14-15, 17-26. Moreover, the contention that the administrative remedies were not exhausted so as to entitle petitioner to challenge the validity of the draft board action in response to the indictment is fully discussed in petitioner's reply to the Government's brief in opposition. See the reply brief, pages 1-6.

The alleged failure of Cahoon to report to the induction station and there undergo physical examination is, at most, mere omission of an optional procedural step which, in a similar case, has been held by the Second Circuit Court to be unnecessary. In *United States ex rel. Kulick* v. *Kennedy*, decided by that court October 29, 1946, Judge Learned Hand said: "Moreover, although a number of the decisions could be explained upon the ground that those inducted had not wholly exhausted their administrative remedies; in a number of others they had done so; and no distinction had been established between the two. Indeed, in *United States* v. *Flakowicz, supra* (146 F. 2d 874), *which had been one of these, the Supreme Court* denied certiorari only a fortnight before May 12th." (Italics added)

Also, in *United States* v. *Balogh*, the Second Circuit

Court of Appeals decided on October 31, 1946, that Balogh was improperly convicted because of the illegality of the draft board determination on facts identical with the facts in this case. Balogh refused to report. There, as here, the ground asserted for refusal to comply with the order was that the draft board denied procedural due process. In that case, as well as in this, the draft board considered the opinions and recommendations of other persons outside the draft board record in arriving at the determination. In the *Balogh* case recommendation of the Theological Panel was considered, while in this case the board considered a book purchased by one of the members of the board of appeal. In that case, as well as in this case, the draft board denied the claim for exemption, thereby denying a full and fair hearing, because all of Jehovah's witnesses considered themselves to be ministers. In the *Balogh* case, Judge Learned Hand said:

"The precise issue was whether the local and appeal boards had given him a fair hearing."

"For these reasons, which the 'Panel' further amplified, it was 'necessary to disregard entirely the use of the word, "minister," by the registrant and by other members of his sect; and to study whether he has been set apart from his fellows for special duties and functions' which 'are those of a minister as that word is intended by Congress.'"

"At the conclusion of his testimony the board again found against him, the chairman of the board, who had done most of the examining addressing him as follows: 'Your contention is untrue that the reason why there are no members of Jehovah's Witnesses in the armed forces is that they keep themselves apart from the world. They don't keep themselves apart from the world any more than you do—so how could you say you would be serving man by entering the Army or Navy. All that you are interested in is evading the service of your country.'"

"The concluding remarks of the chairman of the local board show that he at least did not understand his duties in the spirit of these directions. [Opinion No. 14, Selective Service National Headquarters, quoted by Judge Hand "in extenso in the margin" of his opinion.] He was condemning Jehovah's Witnesses as a whole, when he said that all that 'you are interested in is evading the service of your country'. Had this been a conclusion addressed to Balogh individually, the result of an impartial appraisal of his personal refusal, it might indeed have been immune from attack in the courts. It was not; it was a conclusion denying the exemption to Balogh because of his membership, and not professing to detect him personally as a sham. We should for that reason hesitate to accept the denial of the exemption, made as it was in that humor, even if the record were otherwise without flaw; but it is not. On the contrary the report of the 'Panel' independently invalidated the board's proceedings under our decision in *United States ex rel. Levy* v. *Cain* [149 Fed. (2) 338]. We there reversed the board for two reasons: first, because the 'Panel' was anonymous, and second, because its report invaded the board's functions, and we could not tell how far it had influenced the decision. . . . As the case comes to us, the board made use of evidence of which Balogh may have been unaware, and which he had no chance to answer: a prime requirement of any fair hearing."

"Besides, there was not the slightest excuse for sending the case to a 'Panel' so constituted. As we have said, the record does not tell us, except for the names, who were the three gentlemen who made it up; but even though they were Protestant ministers, they could have no proper part in an inquiry involving Jehovah's Witnesses. . . . So in the case at bar 'Headquarters' might have referred the case to a panel, especially acquainted with the practices of Jehovah's Witnesses, for an opinion whether in accordance

with these, Balogh would be recognized as a 'regular minister'. But the actual 'Panel' had no such competence, and did not assume to have; it did all it could do, it construed the statute. Finally, it was to the last degree ingenuous to expect any light from such a panel, which, to act at all, had first to divest itself of those ingrained habits of mind inevitable in any calling; and to bring a completely detached judgment to a heterodox creed."

For the reasons that the Second Circuit Court reversed the judgment in the *Balogh* case, this court should grant the writ of certiorari here. Indeed, the decision in the *Balogh* case should at least convince this Court that a substantial question is raised in this case which ought to be reviewed by this court.

Conclusion

WHEREFORE, petitioner prays, as in his petition for the writ of certiorari, that the writ be granted, that the cause be set down for argument and submission, and that the judgment of the court below be reversed and the prosecution dismissed or, in the alternative, a new trial be ordered.

Respectfully submitted,

HAYDEN C. COVINGTON
Counsel for Petitioner

Certificate

The undersigned counsel for petitioner hereby certifies that the foregoing petition for rehearing is prepared and filed in good faith so that justice may be done, and not for the purpose of delay.

HAYDEN C. COVINGTON
Counsel for Petitioner